Brotherhood of Locomotive Engineers & Trainmen
1370 Ontario Street, Mezzanine
Cleveland, Ohio 44113-1702

united transportation union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250

September 3, 2008

Via Facsimile (202) 692-5085 and U.S. Mail

Ms. Mary Johnson, General Counsel
National Mediation Board
1301 K Street, N.W.
Suite 250 East
Washington, DC 20005-7011

Re: BLET's and UTU's Comments on Proposed Representation Manual Changes

Dear Ms. Johnson:

United Transportation Union ("UTU") and Brotherhood of Locomotive Engineers and Trainmen ("BLET") respectfully submit their comments in response to the National Mediation Board's ("NMB") July 15 and July 31, 2008 Notices regarding the NMB's Proposed Revisions to its Representation Manual.

Proposed Rule 9.2. NMB proposes to amend Rule 9.2 with respect to eligibility of trainees to vote in representation elections. Specifically, the amendment would provide that a "trainee will be considered eligible if the Carrier provides substantive evidence that the individual is on the payroll, receives benefits, accrues seniority, and has performed work in the craft or class prior to the cut-off date." Training to become a locomotive engineer is a lengthy process, which is governed by Federal Railroad Administration regulations promulgated at Part 240 of Title 49 of the Code of Federal Regulations.

Frequently, the training program for a locomotive engineer extends many months beyond the point at which a trainee is awarded and begins to accumulate seniority as a locomotive engineer. During this period, the trainee is in the "on-the-job training" segment of the training program and does not perform work as a locomotive engineer *per se*. This is a function of the sizeable territories over which locomotive engineers are required to qualify and varies in direct correlation to the size of a particular seniority district. BLET and UTU strongly urge NMB to

clarify that the clause "has performed work in the craft or class" includes performing work as a trainee.

Proposed Rule 19.701. UTU and BLET are concerned about the NMB's controversial proposal that may make it harder for workers to retain their union membership in certain airline and railroad mergers. It is particularly troubling that the Board has taken this step shortly after the announcement of the largest proposed airline merger in American history and at a time when several airlines are contemplating significant mergers. We strongly urge the Board to withdraw this troubling new proposal.

Under the Board's current rules and well-established case law, if a unionized class or craft from one airline or railroad is larger and "not comparable" in size to the class or craft performing the same work at the other airline or railroad in a merger, the former class or craft is automatically certified as the representative of all the workers on the merged airline or railroad. The Board has consistently held a unionized group of workers to be "not comparable" if it constitutes 65 percent or more of the merged group of workers.

On July 15, the Board proposed to amend Section 19 of its Representation Manual ("Manual") to change the procedures for a union to expand its certification after a merger occurs. Under the Board's new proposal, a union's certification would only be extended where that union's membership is "more than a substantial majority" of the merged group, a standard that the Board has never used which appears to be more difficult to satisfy than the current "not comparable" standard. The Board's public announcement provides no explanation for why it proposes to adopt this standard.

Under the proposed Section 19.701, the new threshold for extending certification, as noted, is "more than a substantial majority," and the Board determines what this percentage is, apparently on a case by case basis. This is, at best, an ambiguous, unknown standard with which parties will have no experience, as opposed to the long-settled and well understood comparability analysis that has applied heretofore. The new standard will grant the Board unprecedented discretion to extend or deny certification to unions involved in mergers.

This amendment to the Representation Manual which provides the Board unprecedented discretion appears to be a roundabout way of empowering the NMB to investigate a carrier's representative status on its own initiative. Obviously, as was decided in *RLEA v. NMB*, 29 F.3d 655 (D.C. Cir. 1994), the plain text and legislative history of Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, prohibit the Board from investigating a representation dispute except upon the request of the employees involved the dispute. Accordingly, this proposed modification of the Merger Procedures again poses all sorts of problems for the Board and should be withdrawn.

UTU and BLET also are troubled that the Board would consider adopting a new and uncertain standard for when a union may extend its certification after a merger. For nearly 20 years, the Board has consistently applied the current "not comparable" standard to determine whether a union continues to enjoy majority support from employees subsequent to a merger. Imposing an ambiguous and potentially more difficult standard for automatically extending a certification would cause many covered employers and unions to engage in costly and contentious representation fights when majority union representation has already been established.

When a union represents a majority of a combined class or craft after a merger, the Board in the past would err on the side of extending union certifications and collective bargaining agreements. Losing a union's certification after a merger is exceptionally adverse for the workers, who lose their collectively-bargained wages, job security, and benefits, and is disruptive to stable labor relations. Therefore, any rule change that makes it harder for workers to retain the union's certification – essential to maintaining those contractual terms and conditions of employment – is a reason for grave concern for any represented aviation or railroad worker and the public at large. Such a change could even embolden carriers to merge to eliminate their employees' union membership and impose wage and benefit cuts. While such carriers may see very short-term advantages from reduced labor costs when workers no longer have a voice on the job, the public is the medium and long-term loser. The public will bear the costs associated with protracted labor disputes and a demoralized, less effective workforce, due to the disruption and the assault on worker's rights and terms of employment that the proposed Board rule is inviting.

UTU and BLET are also very concerned with the Board's decision to add a final sentence to Section 19.701 in its July 31, 2008 notice, regarding the use of authorization cards in extending a union's certification. We understand that the Board intends for this language to codify its current policies, which allow a labor organization to extend its certification through a check of authorization cards or voluntary recognition, when the carrier consents to such procedures. Nevertheless, it is unclear to us whether the proposed language adequately conveys the Board's current policies, even after the Board modified the language on July 30. Moreover, since a labor organization may indeed extend its certification through a check of authorization cards, we fail to see why the Board would adopt language stating that "[a]uthorization cards ... may not be used towards getting a certification extended."

Finally, BLET and UTU understand that two of the Board members have expressed the view that this modification is not intended to work a substantive change in relation to its settled "comparability" analysis concerning the situations in which a certification can be extended without an election. In that case, the rule change is needless, and can only sow confusion and suspicion. As a result, UTU and BLET ask that this proposal be withdrawn.

Proposed Rule 13.304-2(5). UTU and BLET find troubling on several levels the Board's proposal to change the longstanding Representation Manual provisions dealing with

Void Ballots in proposed Section 13.304-2(5). This new provision would, for the first time, put the Board in the position of divining the intent of the voter by requiring a determination as to whether an otherwise facially valid vote should not be counted because the representative selected was not actually intended by the voter to serve as a true representative in cases where the vote was for "a current political candidate or other widely known individual ...." This proposed rule is unclear on its face. It would sow unneeded confusion in the process. Voters or organizations may be unclear, for example, as to what the terms "current political candidate or other widely known individual" means and how they would be applied by the Board. For example, is the rule talking about public political candidates for federal, state or local elected office, and if so, which ones, or is the rule talking about union political leaders? This standard is far too vague and would provide the Board too much discretion to negate otherwise clearly valid votes for representation.

The substantive intent of the rule change is even more troubling, however, than its wording. The rule would mark a significant departure for the Board, which has for decades been careful not to engage in the subjective task of divining voter intent concerning the bona fides of a chosen representative. Up to this point, the Board has appropriately determined only the facts of whether the voter is eligible and has in fact clearly expressed a desire for some form of representation. Indeed, in every election, the parties know well and ensure that voters well understand that any valid ballot cast is a vote for representation. There is no need to make the fact-finding role of the Board any more subjective than is necessary to determine whether the voter has clearly expressed a desire for some form of representation. If the Board decides that it must engage in such subjective analysis to determine whether to disqualify some otherwise valid votes for representation, the Board, to be evenhanded, should also determine whether non-voters were improperly influenced by management into not returning a ballot, for example, which is something that the Board typically does not do.

In short, the confusing and subjective standards introduced by this rule change are unnecessary, and will lead to unnecessary and avoidable questions concerning the Board's neutrality in the election process. UTU and BLET believe that the Board's existing rules and practice in this area are sound, well understood, and have served the Board and the parties well for many years. They should not be changed.

Conclusion. UTU and BLET ask the Board to reconsider its proposals to change Rule 19.701 and Rule 13.304-2(5) and withdraw them. BLET and UTU also ask the Board to interpret Rule 9.2 in the manner suggested by these parties. In addition, UTU and BLET adopt and incorporate by reference the arguments made by the AFL-CIO's Transportation Trades Department in its comments submitted in this proceeding regarding the NMB's proposed changes to the Representation Manual.

Respectfully,

Harold A. Ross, Esquire
23195 Stoneybrook Drive
North Olmsted, OH 44070

Counsel for Brotherhood of Locomotive Engineers and Trainmen

Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Counsel for United Transportation Union

HAROLD A. ROSS
Attorney -At- Law
23195 Stoneybrook Drive
North Olmsted, Ohio 44070

Telephone (440) 734-3754

FAX TRANSMITTAL COVER

September 2, 2008

Mary Johnson, Esq.
General Counsel
National Mediation Board
1301 K Street, NW
Washington, DC 20005-7011

FAX NUMBER (202) 692-5085

Re: BLET's and UTU's Comments on Proposed Representation Manual Changes

Dear Ms. Johnson:

Attached for filing is a copy of the above document related to your Notices, dated July 15 and 31, 2008, in 35 NMB No. 62.

Thank you.

Sincerely,

Harold A. Ross
Attorney for BLET